

Rule 26, Ariz. R. Crim. P.

RESPONSE TO MOTION TO STRIKE ALLEGATION OF DANGEROUS CRIME AGAINST CHILDREN

A.R.S. § 13-604.01: The defendant committed a dangerous crime against children and must be sentenced according to the DCAC sentencing statute because his criminal conduct was focused on, directed against, aimed at, and/or targeted toward a victim who was under age 15. The defendant's argument to the contrary does not survive the Arizona Supreme Court's decision in *State v. Sepahi*, 2003 WL 22461767 (Oct. 30, 2003).

The State of Arizona, in response to the defendant's motion to strike the State's allegation that the offense[s] in this case [is a /are] dangerous crime[s] against children under A.R.S. § 13-604.01, asks this Court to deny the motion, for the reasons stated in the following Memorandum.

MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTUAL AND PROCEDURAL BACKGROUND

[Insert facts of offense, including fact that the defendant is an adult or juvenile tried as an adult, and including the victim's age. Explain what charges are pending against the defendant and what stage the case is in procedurally.] The State filed an allegation that the defendant's [crime is a /crimes are] dangerous crime[s] against children [DCAC] under A.R.S. § 13-604.01(l)([insert appropriate subsection letter]). The State alleged that the [offense was a/ offenses were] DCAC in the [first/second] degree because the [offense was/ offenses were/ offense was not/ offenses were not] completed.

The defendant has now moved to strike the DCAC allegation. Citing *State v. Williams*, 175 Ariz. 98, 854 P.2d 131 (1993), *State v. Samano*, 198 Ariz. 506, 11 P.3d 1045 (App. 2000) and *State v. Sepahi*, 204 Ariz. 185, 61 P.3d 479 (App. 2003) [*Sepahi*

I], *vacated by State v. Sepahi*, 2003 WL 22461767 (Arizona Supreme Court, October 30, 2003) [*Sepahi II*], the defendant argues that there is no evidence that he is “peculiarly dangerous to children” or that he poses any direct or continuing threat to Arizona’s children. He concludes that this Court must dismiss the DCAC allegation and may not sentence him under A.R.S. § 13-604.01.

II. LAW AND ARGUMENT:

A. The DCAC allegation applies here because the defendant’s criminal conduct was focused on, directed against, aimed at, and/or targeted at the victim, a child under the age of fifteen.

A.R.S. 13-604.01(L)(1) defines a “dangerous crime against children” as any of a number of listed offenses “that is committed against a minor who is under fifteen years of age.” A.R.S. § 13-604.01 provides mandatory sentencing provisions for adult defendants, and juveniles tried as adults, who have been convicted of a DCAC.

In *State v. Williams*, 175 Ariz. 98, 103, 854 P.2d 131, 136 (1993), the Arizona Supreme Court stated that in order for an offense to be a dangerous crime against a child, “the defendant’s conduct must be focused on, directed against, aimed at, or target a victim under the age of fifteen.” Williams drove drunk and recklessly rammed his truck into another vehicle, seriously injuring a child passenger in that vehicle. Williams was charged with aggravated assault and the State filed a DCAC allegation. The jury found that the victim was a child under the age of fifteen and the trial court sentenced Williams for a DCAC. On appeal, the Arizona Supreme Court vacated the DCAC sentencing. The Court reasoned that Williams had not committed a DCAC and could not be sentenced under A.R.S. § 13-604.01 because there was no evidence that Williams’s reckless behavior was “directed at or focused upon the victim, or that he was even aware of the minor’s presence” in the other vehicle. *Id.* The Court asserted that the DCAC statute

“refers to crimes in which a child is the target of the criminal conduct. That is to say, a dangerous crime against a child is a crime against a child *qua* child.” ... [A] crime against a child is a crime against a child as a child or in the capacity of a child.” *State v. Williams*, 175 Ariz. 98, 101, 854 P.2d 131, 134 (1993). The Court rejected the argument that the DCAC statute applied any time any crime victim happened to be under 15, reasoning that the statute’s “special penalties ... are calculated to deal with persons peculiarly dangerous to children.” *Id.* at 103, 854 P.2d at 136. Although the defendant need not know that the victim is underage, the defendant must target an underage person for a DCAC sentence to be proper under A.R.S. § 13-604.01. *Id.*

The Court of Appeals followed *Williams* in *State v. Jansing*, 186 Ariz. 63, 918 P.2d 1081 (App. 1996), *overruled on other grounds by State v. Bass*, 198 Ariz. 571, 12 P.3d 796 (2000). Jansing drove drunk with her own young son in her own car and crashed into another vehicle, killing the other driver and injuring her son. The State charged the aggravated assault on the son as a DCAC. The State contended that *Williams* was distinguishable because Williams was not aware there was a child present, while Jansing knew her young son was in her own car. The Court of Appeals disagreed, stating that Jansing’s reckless actions were not directed against or aimed at her son, and therefore vacated the DCAC sentence imposed.

State v. Samano, 198 Ariz. 506, 11 P.3d 1045 (App. 2000), followed and expanded on *Williams* and *Jansing*, *supra*. Samano and an accomplice burglarized an apartment at gunpoint and robbed a woman who lived there. They forced her to “sit down” and “shut up” as they looked for items to steal. *Id.* at 508, ¶ 3, 11 P.3d at 1047. Her small child was wandering around the apartment and Samano told her to hold the

child, which she did. Samano was convicted of burglary, armed robbery, theft, and two counts of kidnapping. The trial court sentenced the defendant for a DCAC for kidnapping the child. On appeal, Samano argued that the child's kidnapping was purely incidental to the burglary and robbery and was not based on the victim's status as a child. Citing *Williams, supra*, Samano also argued that he should not be sentenced for a DCAC because he was not a predator and did not pose any continuing threat to children. *Samano, id.* at 508, ¶ 5, 11 P.3d at 1047. The Court of Appeals noted that A.R.S. § 13-604.01 “contains no prerequisite to its application that one be a ‘predator’ or pose a continuing threat to the children of Arizona.” *Id.* at ¶ 7. Nevertheless, the *Samano* Court reasoned that the DCAC sentencing provisions should apply only to criminals who specifically prey on children or pose a continuing threat to children. *Id.* at 511, ¶ 20, 11 P.3d at 1050. Accordingly, the Court vacated Samano's DCAC sentence, finding that there was no evidence in the record to show that Samano preyed on children or posed a continuing threat to them.

It was in the context of *Williams, Jansing*, and *Samano* that the Court of Appeals decided *Sepahi I*, upon which the defendant here relies. Sepahi shot a 14-year-old in the stomach after an argument. The Court first found that Sepahi's conduct was clearly “aimed at” and “targeted” the child as his victim. However, the Court reasoned that *Williams, supra*, and *Samano, supra*, had imposed a second requirement for DCAC sentencing – namely, that the State must also show that the defendant is “peculiarly dangerous to children” or posed a “direct and continuing threat to the children of Arizona.” *Sepahi I*, 204 Ariz. 185, 189, ¶ 14, 61 P.3d 479, 483 (App. 2003). Because

there was no evidence that Sepahi specifically preyed on children or posed any continuing threat to children, the Court of Appeals vacated the DCAC sentencing.

In *State v. Sepahi*, 2003 WL 22461767 (Arizona Supreme Court, Oct. 30, 2003) [*Sepahi II*], the Arizona Supreme Court vacated the decision in *Sepahi I* and held that Sepahi must be sentenced for a DCAC because he specifically targeted the victim, who was in fact a child. Construing the statutory language “committed against a minor under fifteen years of age,” the Court found that that it would stretch that language “beyond ordinary bounds to read it as also necessitating proof of some sort of special continuing dangerous status on the part of the defendant. While the legislature could have rationally passed such a statute, it did not do so, and we cannot rewrite the statute to reach such a result.” *Sepahi II* at ¶ 16. If the defendant directs his conduct against a particular person, he is subject to DCAC sentencing if that person turns out to be a child, even if the defendant reasonably believed that the intended victim was an adult. *Id.* at 17. The Court explained that *Williams*’s “child *qua* child” language “imposes no additional requirement over and above that of targeting the victim; rather, it explains why the statute requires such targeting, and not simply that the victim be a child.” *Id.* at ¶ 18.

III. CONCLUSION

The defendant’s conduct here is clearly encompassed under the definition of “dangerous crime against children” set forth in A.R.S. § 13-604.01. The defendant’s conduct was focused on, directed against, aimed at, and/or targeted toward the victim, who was under fifteen years old. Therefore, the State asks this Court to deny the motion

to strike the DCAC allegation and hold that the defendant must be sentenced for this offense as a DCAC under A.R.S. § 13-604.01.